Office Supreme Court, U. S.
FILED
FEB 27 1922
WM. R. STANSBURY

Supreme Court of the United States

OCTOBER TERM, 1921.

15-16

NOS. ~~17-18~~, ORIGINAL

THE COMMONWEALTH OF PENNSYLVANIA,
COMPLAINANT,

vs.

THE STATE OF WEST VIRGINIA, DEFENDANT.

THE STATE OF OHIO, COMPLAINANT,

vs.

THE STATE OF WEST VIRGINIA, DEFENDANT.

ADDITIONAL BRIEF FOR DEFENDANT, THE STATE OF WEST VIRGINIA ON RE-ARGUMENT

EDWARD T. ENGLAND,
Attorney General of West Virginia;
FRED O. BLUE,
GEORGE M. HOFFHEIMER,
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STATEMENT

The order of restoration to the docket was for re-argument with special reference to the questions:

"(1) Whether the suit was not prematurely brought as no action has been taken either by the State or by the State Commission under the statute; and

"(2) Whether the bill presents a cause justiciable between the two States parties to the action."

For convenience the two questions will be discussed in inverse order.

I.

THE BILL IN EITHER CASE DOES NOT PRESENT A CAUSE JUSTICIABLE BETWEEN THE TWO STATES PARTIES TO THE ACTION.

In our original brief we asserted the foregoing proposition in the statement that the cases presented no controversy between two or more States within the meaning of Article 3, Section 2, of the Constitution. That proposition we still maintain.

The statute complained of is local in character and applies to gas produced within West Virginia, while yet within its borders and in the hands of its public service corporations. The plaintiffs have no ownership of, or property interest in, the gas in its original character as a natural resource of West Virginia, or at any time thereafter during the successive stages of production, transportation or marketing thereof to the ultimate consumer. Neither does the statute in anywise affect, modify or trench upon any governmental or corporate power of the plaintiffs; nor does its operation impair the integrity of, or exert any force upon, or prejudicially affect any land, stream or other property within the territorial jurisdiction of the plaintiffs. The thing most clamorously complained of is the assumed interference with the export of the gas in interstate commerce, and the consequential

interference with the ultimate delivery thereof to citizens of Ohio and Pennsylvania. Subsidiary and trifling in comparison are the complaints of shortage of gas in municipalities and public institutions,—a matter aptly characterized in the language of Mr. Justice Holmes in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237, as "merely a make-weight." A further grievance sought to be appropriated by the plaintiffs as their own, is the alleged injury to the companies and persons engaged in West Virginia gas operations, the property and business of which, it is predicted, will be prejudiced by the enforcement of the statute.

In entering upon the discussion of these specific elements of the bills we suppose it to be indisputable that the mere fact that States are named as parties does not conclude the question of jurisdiction, or characterize a cause as justiciable between States.

Kentucky v. *Dennison*, 24 How. 66.
New Hampshire v. *Louisiana*, 108 U. S. 76, 89.
New York v. *Louisiana*, 108 U. S. 76, 89.
Wisconsin v. *Pelican Ins. Co.*, 127 U. S. 265, 287.
Missouri v. *Illinois*, 180 U. S. 208, 239.
Kansas v. *United States*, 204 U. S. 331, 341.
Oklahoma v. *Atchison, T. & S. F. R. Co.*, 220 U. S. 277, 289.
Oklahoma v. *Gulf, C. & S. F. R. Co.*, 220 U. S. 290, 298.

Whether a suit is against a State, in the constitutional sense, is a matter of substance and effect, not to be determined by the names of the parties.

Louisiana v. *Jumel*, 107 U. S. 711, 726.
Hagood v. *Southern*, 117 U. S. 52, 69.
Minnesota v. *Hitchcock*, 185 U. S. 373, 387.

Murray v. *Wilson Distilling Co.*, 213 U. S. 151, 158.

Louisiana v. *McAdoo*, 234 U. S. 627, 629, 632.

In *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana*, *supra*, it was considered that as the plaintiffs had no interest in the bonds sued on, they were mere nominal parties, and that no controversy between States was involved.

As remarked by Mr. Justice Gray in *Wisconsin* v. *Pelican Ins. Co.*, *supra:*

> "Yet notwithstanding the comprehensive words of the Constitution, the mere fact that a State is the plaintiff is not a conclusive test that the controversy is one in which this Court is authorized to grant relief against another State or her citizens."

And in *Kansas* v. *United States*, *supra*, it was said:

> "In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this Court of the claim of the railroad company, and our original jurisdiction cannot be maintained."

Conceding that no hard and fast line has yet been drawn delimiting the justiciable and the non-justiciable between States (*Missouri* v. *Illinois*, 180 U. S. 208, 241,) we think that a brief survey of the cases and the mode of their disposition (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 287, 297) readily marks the present litigation as falling within the latter category. It is not the "subject of judicial cognizance" (*Hans* v. *Louisiana*, 134 U. S. 1, 15; *Louisiana* v. *Texas*, 176 U. S. 1, 15; *Missouri*

v. *Illinois*, 180 U. S. 208, 233) or "susceptible of judicial solution" (*Louisiana* v. *Texas*, 176 U. S. 1, 18, 22; *Missouri* v. *Illinois*, 180 U. S. 208, 233, 234.)

Of the cases of which this Court has taken original jurisdiction the most numerous have been those relating to the boundaries or territorial integrity of the contending States.

> *Virginia* v. *West Virginia*, 11 Wall. 39.
> *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 288,
> *Louisiana* v. *Mississippi*, 202 U. S. 1, 35, 36.
> *Virginia* v. *West Virginia*, 246 U. S. 565, 591, note.

In another class of cases jurisdiction was exercised because of the creation or maintenance of a nuisance by the invasion of the plaintiff states by sewerage or disease germs polluting their waters and soil, to the injury, actual or threatened, of the lives, health and property of the citizens of those States. Examples are to be found in *Missouri* v. *Illinois*, 180 U. S. 208, 200 U. S. 496; and *New York* v. *New Jersey*, U. S. Adv. Ops., 1920-21, p. 544. Falling within the same category is *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237, in which it was remarked by Mr. Justice Holmes that in the capacity of quasi-sovereign:

> "A state has an interest independent of and behind the titles of its citizens in all the earth and air within its domains."

We think that these nuisance cases are identical in principle with the boundary cases. The sovereign rights and territorial integrity of a State may be as effectually invaded or infringed by the casting or precipitation thereon of intangible, but nevertheless noxious, bacteria or gases as by visible seizure of its lands. In *Kansas* v.

Colorado, 206 U. S. 46, 97, the case of *Missouri* v. *Illinois* was referred to by Mr. Justice Brewer as one in which "the action of one State reaches, through the agency of natural laws, into the territory of another State."

Kansas v. *Colorado*, 185 U. S. 125, 206 U. S. 46, in which jurisdiction was sustained, was similar in aspect. Not only was the territorial integrity of Kansas affected by Colorado's diversion of the waters of the Arkansas River, which in the course of nature would have flowed into Kansas; but also Kansas claimed to be injured in its capacity as the owner of a "large tract of land bordering on the Arkansas River." (206 U. S. 99.)

In *Pennsylvania* v. *Wheeling & B. Bridge Co.*, 13 How. 518, the suit was treated "as brought to protect the property of the State of Pennsylvania." (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 296.)

Another class of cases has been those of contract,—of indebtedness from one State to another, or to the creditors of the latter, from the debts to whom the plaintiff was entitled to exoneration at the hands of the defendant.

South Dakota v. *North Carolina*, 192 U. S. 286.
Virginia v. *West Virginia*, 206 U. S. 290; 220 U. S. 1, 26-28; 238 U. S. 202, 208.
United States v. *North Carolina*, 136 U. S. 211.
United States v. *Michigan*, 190 U. S. 379.

Comparison of *South Dakota* v. *North Carolina* and *Virginia* v. *West Virginia* with *New Hampshire* v. *Louisiana*, *supra*, plainly indicates that jurisdiction in the former cases was predicated upon the existence of property rights in the plaintiff States or the protection of their corporate credit.

In all of the foregoing cases in which jurisdiction was upheld, the object was to maintain the territorial integ-

rity of the plaintiff (as in the boundary cases and in *Kansas* v. *Colorado*), or to prevent the invasion of its territory (even though the invasion may have been by the intangible instrumentality of disease germs, as in *Missouri* v. *Illinois* and *New York* v. *New Jersey*, or a noxious gas, as in *Georgia* v. *Tennessee Copper Co.*), or to recover the property or uphold the credit of the plaintiff (as in *South Dakota* v. *North Carolina* and *Virginia* v. *West Virginia.*)

But neither in those cases nor elsewhere have we found an instance in which this Court has entertained original jurisdiction predicated solely upon the right of the plaintiff State to sue as *parens patriae*, or as the representative of its citizens, to enforce their private grievances or to protect their private claims arising out of the enforcement of the law of another State, in the absence of a special or additional right of the character above indicated in the plaintiff State itself.

In *New Hampshire* v. *Louisiana*, 108 U. S. 76, 89, 90, and the companion case of *New York* v. *Louisiana*, it was strongly pressed on the Court that the plaintiffs might prosecute the suits "because, as the sovereign and trustee of its citizens, a State is 'clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former.' " But jurisdiction was denied on the ground that the plaintiffs had no interest in the bonds sought to be collected.

In *Louisiana* v. *Texas*, 176 U. S. 1, the plaintiff sought to enjoin enforcement of quarantine laws of the defendant, because of their discrimination against and injurious effect on citizens of Louisiana engaged in commerce between the two States. In declining jurisdiction, Mr. Chief Justice Fuller said:

"It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian, or representative of all her citizens.

"She does this from the point of view that the State of Texas is intentionally absolutely interdicting interstate commerce as respects the State of Louisiana by means of unnecessary and unreasonable quarantine regulations. Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large. Nevertheless, if the case stated is not one presenting a controversy between these States, the exercise of original jurisdiction by this Court as against the State of Texas cannot be maintained."

In a concurring opinion Mr. Justice Harlan said:

"But I am of opinion that the State of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this Court on account of the matters set forth in its bill. The case involves no property interest of that State. Nor is Louisiana charged with any duty, nor has it any power, to regulate interstate commerce. Congress alone has authority in that respect. When the Consti-

tution gave this Court jurisdiction of controversies between States, it did not thereby authorize a State to bring another State to the bar of this Court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of the complaining State in its sovereign or corporate capacity, but which at most effect only the rights of individual citizens or corporations engaged in interstate commerce. The word 'controversies' in the clauses extending the judicial powers of the United States to controversies 'between two or more States' and to controversies 'between a State and citizens of another State,' and the word 'party' in the clause declaring that this Court shall have original jurisdiction of all cases 'in which a State shall be a party,' refer to controversies or cases that are justiciable as between the parties thereto, and not to controversies or cases that do not involve either the property or powers of the State which complains in its sovereign or corporate capacity that its people are injuriously affected in their rights by the legislature of another State. The citizens of the complaining State may, in proper cases, invoke judicial protection of their property or rights when assailed by the laws and authorities of another State; but their State cannot, even with their consent, make their case its case and compel the offending State and its authorities to appear as defendants in an action brought in this Court. If this be not so, we were wrong in *New Hampshire* v. *Louisiana*, 108 U. S. 76, in which case it was held that one State could not, by taking charge of demands or debts held by its citizens against another State,

> acquire the right to bring a suit in its name in this Court against the debtor State."

The principle of *Louisiana* v. *Texas* was still later applied in a case all the more forcible because it did not involve interstate commerce, *Oklahoma* v. *Atchison, T. & S. F. R. Co.*, 220 U. S. 277. There Oklahoma sought to invoke the original jurisdiction in a suit to enjoin a foreign railroad company from charging more than specified rates on domestic shipments of lime, cement, plaster, brick, stone and crude and refined oil, in violation of an Act of Congress granting rights of way, passed while Oklahoma was a territory and the benefit of which statute the State claimed. In the bill it was alleged that these commodities were essential to the growth of the State; that the violation by the railroad company was a menace to the future of the State; and that if the railroad company was permitted further to operate the railroad in violation of the conditions of the grant contained in the Act of Congress it would be a hindrance to the growth of the State, as well as an injury to the property rights of its inhabitants. In holding jurisdiction not to exist, Mr. Justice Harlan referred with approval to *Louisiana* v. *Texas*, and said that if illegal rates were charged a controversy would exist between each shipper and the Company. He then says in the opinion:

> "But, plainly, the state, in its corporate capacity, would have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma. * * * In the pres-

ent case, the state seeks to enjoin the defendant company from charging more than the Kansas rates on the transportation of lime, cement, plaster, brick, stone, crude and refined oil. But the state, as such, in its governmental capacity, is not engaged in their sale or transportation, and has no property interest in such commodities. It seeks only, as between the railway company and shippers, by a general, comprehensive decree to enforce certain rates, and to compel the railway company to respect the rights of all of the people of Oklahoma who may have occasion to ship such commodities over the railway."

In the same opinion it is further said:

"These doctrines, we think, control this case, and require its dismissal as not being within the original jurisdiction of this court, as defined by the Constitution. Under a contrary view that jurisdiction could be invoked by a state, bringing an original suit in this court against foreign corporations and citizens of other states, whenever the state thought such corporations and citizens of other states were acting in violation of its laws to the injury of its people generally or in the aggregate; although an inquiry in violation of law, to the property or rights of particular persons through the action of foreign corporations or citizens of states, could be reached, without the intervention of the state, by suits instituted by the persons directly or immediately injured.

"We are of opinion that the words in the Constitution conferring original jurisdiction on this court in a suit 'in which a state shall be a party' are not to be interpreted as conferring such juris-

> diction in every cause in which the state elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."

A like conclusion was reached in *Oklahoma* v. *Gulf C. & S. F. R. Co.*, 220 U. S. 290, 301, refusing jurisdiction of a suit to enjoin citizens of other States from violation of the prohibition laws of Oklahoma, it being held that the case was not "a suit to which a State shall be a party;" and that a State could not maintain a suit on its behalf, "where the primary purpose of the suit was to protect its citizens *generally* against the violation of its laws by the corporations or persons sued."

And see:

> *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 20, per Marshall, C. J.

From the foregoing it is evident that a suit by one State against another cannot be predicated upon the mere relation of *parens patriae;* that something more than a willingness or desire to vindicate the supposed rights of the plaintiff's citizens is requisite; and that the multiplicity or unanimity of complaints by the citizens of the one State against the acts of the other cannot, by a process of aggregation or combination, be erected into a controversy between States or present a cause justiciable between such States.

If we are correct in the foregoing views, it then follows that no justiciable cause arises by reason of the alleged threatened deprivation or shortage of gas supply to the inhabitants of the plaintiff States. And much the more is this true in respect of the alleged infringement of constitutional guaranties of companies engaged in

gas transportation, or of citizens of the plaintiff States alleged to have made investments in West Virginia, "since it is a well settled rule of this Court that it only hears objections to the constitutionality of a law from those who are affected by its alleged unconstitutionality in the features complained of." "The plaintiffs must show that their own rights are infringed."

> *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S., 571, 576.
> *New York Central R. Co.* v. *White,* 243 U. S., 188, 199.
> *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S., 531, 545.
> *Arkadelphia Mill Co.* v. *St. Louis S. W. R. Co.,* 249 U. S. 134, 149.
> *Dahnke-Walker M. Co.* v. *Bondurant,* U. S. Adv. Ops., 1921-1922, p. 114.

If original jurisdiction is attempted to be sustained because of the supply of West Virginia gas to municipalities or public institutions in Ohio and Pennsylvania, the jurisdiction is equally negatived by the above cited cases. In *Louisiana* v. *Texas,* 176 U. S. 1, 18, it was remarked by Mr. Chief Justice Fuller, in regard to controversies between states,—

> "there must be a direct issue between them, and the subject matter must be susceptible of judicial solution."

And again at page 22, it is said that,—

> "a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of *as in themselves*

> *committing one state to a distinct collision with a sister state.*" (Italics ours.)

Later it was said by the same Chief Justice, with the concurrence of Harlan and White, JJ., in their dissent in *Missouri* v. *Illinois*, 180 U. S. 208, 249, and not denied in the prevailing opinion of Mr. Justice Shiras, that,—

> "it must be made to appear that the states are in direct antagonism as states."

And in *Kansas* v. *Colorado*, 185 U. S. 125, 145, the chief Justice again said:

> "The gravamen of the bill is that the state of Colorado, acting directly herself, as well as through private persons thereto licensed, is depriving and threatening to deprive the State of Kansas and its inhabitants of the water heretofore accustomed to flow in the Arkansas River through its channel on the surface and through a subterranean course across the State of Kansas." * * *

It cannot be overlooked that the alleged rights claimed by the plaintiffs for themselves, as well as for their inhabitants, are alleged rights to West Virginia gas derived and derivable through public-service gas companies of West Virginia. Thus mediately derived, the alleged rights of the plaintiffs, as consumers of West Virginia gas in their municipalities or public institutions, can rise no higher than the West Virginia gas companies. We do not ignore the distinction between a question of jurisdiction, and the question whether the alleged right, prosecuted in the particular forum, really exists. But if the plaintiffs have a right to West Virginia gas,

it is a right against the public service gas companies operating in West Virginia. And if as against some of these companies, as citizens of West Virginia, a suit might conceivably be brought in this Court to compel such companies to furnish gas to or for the use of the plaintiffs in a sovereign or corporate capacity, it would, at best, involve a controversy between the plaintiff States and such companies, and not a controversy between the plaintiffs and West Virginia. This, of course, is a basis of jurisdiction not invoked in the present cases. Whether, if such a suit were brought, it would be necessary for West Virginia to intervene to uphold its statute, and in the interest of a full hearing upon the validity of the statute under which the gas companies ought properly to justify, we need not discuss. But it is apparent that:

(a) On the one hand, whether the West Virginia companies shall furnish gas to the plaintiffs, is at most, a matter of controversy between such companies and the plaintiffs, and not a controversy between the plaintiffs and West Virginia, within the meaning of the constitution; and,

(b) The question whether West Virginia may validly regulate its public service corporations in the manner attempted by the statute in litigation, involves a controversy between West Virginia and such corporations, and is not a controversy between States within the meaning of the constitution.

In either view,—and both views extend to the full scope of these cases—there is no original jurisdiction in this Court.

II.

THE SUITS WERE NOT PREMATURE MERELY BECAUSE NO ACTION WAS TAKEN BY WEST VIRGINIA OR ITS PUBLIC SER-

VICE COMMISSION UNDER THE STATUTE. THE SUITS WERE PREMATURE IN THE SENSE THAT AT THE TIME OF THE COMMENCEMENT OF THE SUITS, NO THREATENED INJURY OF SERIOUS MAGNITUDE WAS CLEARLY OR CONVINCINGLY PROVED OR SUSCEPTIBLE OF CLEAR OR CONVINCING PROOF.

For the purpose of response to the question whether the suits were prematurely brought, we assume that in other respects the bills present causes justiciable between States; though the assumption is contrary to our views as to the jurisdiction. For if no jurisdiction exists, the question of prematurity becomes immaterial.

We do not think that the question of prematurity admits of a categorical answer, uniformly applicable to the whole subject matter. In one aspect the suits were premature; and in another view they were not. We shall refer to both phases.

The statute in contest, as we have argued in the original brief for West Virginia and at the former hearing, was enacted in the exercise of the State's regulatory power over its public service gas companies, in order to require them to render a reasonably adequate service to the specified consumers in the State.

The statute was passed February 10, 1919, and, apart from the injunction herein, became effective under the West Virginia Constitution (Art. 6, sec. 30), ninety days after its passage, May 11, 1919. The bills were filed May——, 1919, and the injunctions to prevent enforcement of the statute were issued June 3, 1919. So that no real opportunity occurred to test the statute in actual practice.

The bills charged, in substance, that, in addition to the infringement of other alleged constitutional rights, the enforcement of the statute woud prohibit interstate transportation, and confine to West Virginia and ab-

sorb in local consumption the gas which otherwise would have been transported to the other States.

The answers averred, in substance, the progressively increasing shortage of gas; the enormous quantities of the gas transported to, and for consumption in, other States; the inadequacy of the gas supply to West Virginia consumers, resultant from the diminished production of West Virginia gas and its out-of-state consumption; and the purpose of the statute to compel the public service gas companies to perform their duties. The answers also admit that by the furnishing of a reasonably adequate supply of gas for the use of the public in West Virginia, as required by the statute, the volume of West Virginia gas available for transportation to, or for consumption in, the other States, and the quantity of gas so transporated, will be indirectly or incidentally diminished, unless the gas companies shall increase gas production in West Virginia. But it is alleged that in case of the failure to increase the production of West Virginia gas, whether or not the quantity transported to the other states will be appreciably decreased will depend in a large degree upon the apportionment of the gas transported from West Virginia by the seven large companies named among the several States desiring to consume the same. It is, among other things, denied that the enforcement of the statute will require all, or substantially all, of the West Virginia gas; or that the transportation of gas from West Virginia to the other States will be prohibited; or that the furnishing of a reasonably adequate supply to the West Virginia public, will require or consume any large proportion of the gas transported to, or for consumption in, other States. (Answer to Ohio bill, pp. 33, 34; answer to Pennsylvania bill, pp, 33, 34.) Aside from the manifest intention of West Virginia to enforce the statute, its purpose to impose fines, penalties and imprisonment in accord-

ance with the statute, for disobedience of the authorized orders of the Public Service Commission, is specifically alleged. (Answer to Ohio bill, p. 40; answer to Pennsylvania bill, p. 44.)

The proofs to which we sufficiently referred in the original brief, showed the shortage of gas, which was to be anticipated from the beginning; that no further sources of supply were known or probable, that prior to the enactment of the statute the apportionment of West Virginia gas as between the consumers in that State and elsewhere was in fact determined by the gas companies, to the detriment of the West Virginia consumers; and that augmentation of the supply to West Virginia consumers would correspondingly subtract from the volume apportionable to consumers in the other States.

Assuming, as we do, for present discussion, that in other respects justiciable causes exist, we think that in this situation, the suits were not premature insofar as they sought to test the contitutionality of legislation having the probable, though indirect or incidental, consequence of diminishing the quantity of gas which the gas companies, in the absence of the regulatory statute, would have diverted to the plaintiff States. By the enactment of the statute, West Virginia,—in the act of its legislature, its most authoritative and solemn mode of expression,—avowed its intention to require its public service gas companies to render reasonably adequate service to the specified consumers, from and after the effective date of the statute. And to that end it not only imposed on the gas companies referred to the unconditional and mandatory duty to furnish to the specified consumers a reasonably adequate supply of gas (*Acts of* 1919, Ch. 71, sec. 1), but also provided suitable procedure to coerce the performance of that duty either by suits for damages (sec. 5) or by application to the Public Service Commission, the orders of which could be

enforced by penalties. (Secs. 2, 3, 4; and see *Public Service Commission Act,—Acts of* 1913, secs. 11, 17.)

The West Virginia public service gas companies being then subject to legislation which threatened a multiplicity of actions at law and proceedings before the Commission, calculated to enforce obedience (see *Smyth* v. *Ames*, 169 U. S. 466, 518; *Ex parte Young*, 209 U. S. 123, 163); and no procedure being provided whereby the plaintiff States or their inhabitant gas consumers could invoke the remedies provided by the statute now in contest, we think it logically to follow that if ever the plaintiffs were to possess a justiciable right to contest the validity of the statute,—though we deny the justiciable right,—the right, if any, existed as well on the day of the filing of the bills as it could or would at any future time, insofar as they could supply the quantum of proof requisite in a controversy between States. Whether or not the plaintiffs could succeed in their attempt was and is another matter.

That West Virginia, after enacting the statute and providing appropriate procedure and sanctions, or its Public Service Commission, has taken no additional action, does not appear to us to affect the point of prematurity. If further action by the State or Commission were requisite, we respectfully inquire what action it must be? Would it be enough that one aggrieved consumer should complain to the Commission? Or must the Commission proceed to final order in his case? Would it suffice that the order should affect a few thousand cubic feet of gas, the deprivation of which would be inappreciable in the other States; or must there be a multiplication of proceedings, until, and under such circumstances that, the aggregate of deprivation becomes appreciable or of serious magnitude?

In *Smyth* v. *Ames*, 169 U. S. 466, the statute fixing rates and otherwise regulating railroad traffic was to go

into effect August 1, 1893. The State Board of Transportation was vested with powers and duties in the hearing and determination of matters arising out of violation of the statute. An attack was made upon the constitutionality of the statute on the ground that the rates prescribed were confiscatory, the bill for injunction being filed by stockholders of the railroad companies June 28, 1893, three days before the statute was to become a law. And the bill was sustained.

In *Ex parte Young,* 209 U. S. 123, the injunction suits out of which the contempt proceeding arose were instituted on the day preceding that on which the statute was to become a law, the plaintiffs being stockholders of railroad companies again seeking to enjoin compliance with a State law fixing rates, alleged to be confiscatory. The question of prematurity of suit was urged in the contention that the constitutionality of the statute should be tested by disobeying it "at least once," and defending against the consequences. But this Court refused to adopt this point of view.

In *Public Service Co.* v. *Corboy,* 250 U. S. 153, a suit to enjoin an administrative order authorizing the construction of a drainage ditch and appointing a commissioner to do the work, no work had been commenced when the suit was commenced attacking the order on the ground that its enforcement would necessarily result in injury to the plaintiff by diminution of the flow of water in the Little Calumet River, in contravention of the plaintiff's alleged right to have the flow maintained in normal volume.

In *New York* v. *New Jersey,* U. S. Adv. Ops., 1920-21, p. 544, the suit seems to have been instituted in the year 1908, to enjoin the carrying out of a plan of the Passaic Valley Sewerage Commissioners appointed by New Jersey for the construction of a drainage system to discharge the refuse of the Passaic Valley into the New

York Bay. So far as the report and opinion show, the suit was instituted in advance of any action to carry out the plan, and following an abortive effort by the commissioners to agree with New York officials upon a plan that would avoid pollution of the bay.

In *Coal & Coke R. Co.* v. *Conley,* 67 W. Va. 129, 138, a bill was sustained, though filed in 1909, to enjoin as confiscatory the "Two Cent Rate Act," enacted in 1907, which had been obeyed by the railroad company until the commencement of the suit. Having concluded no longer to comply with the statute, the prayer of the bill was for an injunction to restrain the attorney general and prosecuting attorney "from attempting to enforce such penalties as might thereafter accrue by reason of non-observance of the limitation prescribed by said act."

In *Prentis* v. *Atlantic Coast L. Co.,* 211 U. S. 210, in which the question of prematurity of the suit arose, the decision turned upon the fact that the rates fixed by the Virginia Corporation Commission were subject to review and change upon an appeal to the Court of Appeals of that State. It was thought by this Court that the railroad companies, in filing their bills in advance of application to the Court of Appeals, did not "make sure that the State, in its final legislative action, would not respect what they think their rights to be, before resorting to the Courts of the United States." And it was added that when, upon application to the Court of Appeals, "the rate is fixed, a bill against the Commission to restrain the members from enforcing it, will not be bad as an attempt to enjoin legislation, or as a suit against a State, and will be the proper form of remedy." (211 U. S. 230.)

Subsequently, in *Bacon* v. *Rutland R. Co.,* 232 U. S. 135, the *Prentis Case* was distinguished, and it was pointed out that the right to sue in the Federal Court arose as soon as the exercise of "legislative powers" had passed and "the judicial stage had been reached." And

it was said that in the *Prentis Case* it was held proper, before resorting to the Circuit Court of the United States, "to make sure that the officers of the State would try to establish an unconstitutional rule." (232 U. S. 137.)

While, therefore, we think that the suits were not premature as an attempt to show, in advance of further action on the part of West Virginia, that the statute is invalid on the ground that its enforcement would or might diminish the volume of West Virginia gas available for transportation to other States, the suits in another aspect were premature.

Despite the argument of the plaintiffs to the contrary, it is hardly deniable that West Virginia possesses at least some right and power of regulation of its public service gas companies, to compel them to furnish gas to West Virginia consumers. The sources of that right and power, in the circumstances of the cases now at bar, were sufficiently pointed out in the original brief for West Virginia, to which we refer. The statute of Ohio, prescribing "necessary and adequate service and facilities, which shall be reasonable and just," and the Pennsylvania law, requiring service "reasonably adequate and practically sufficient for the accommodation of its patrons, employees and public," are substantially identical with the primay requirement of the statute now in question.

> *Ohio Gen. Code*, sec. 614-12.
> *Penn. Public Laws of* 1913, p. 1374; *Pub. Service Com. Law*, Art. I, sec. 1.

Assuming, then, the possession by West Virginia of some power in the premises, and keeping in mind the established fact that an inadequate service is equivalent to none (W. Va. Original Brief, pp. 67, 68), the right and power of West Virginia must logically extend to some-

thing more than the compulsion of a worthless service. They must embrace the requirement of a reasonably adequate service.

And assuming the right and power of West Virginia to require a reasonably adequate service to its consumers, the effect of that requirement upon the plaintiffs and their citizens will necessarily depend upon the manner and extent of the application of the statute. To decide now, once and for all, the validity of the statute, would call upon the Court to determine from conflicting evidence,—much of it entirely conjectural,—the amount of gas requisite to afford a reasonably adequate supply for the designated West Virginia consumers, the probable action of the Public Service Commission, the varying circumstances of the individual gas companies and the localities in the plaintiff States deriving gas from or through them, the extent of the diminution of the gas transported to the other States, by reason of the operation of the statute, and the apportionment which the gas companies would make among the other states, if the statute had never been passed or were never enforced. These and other matters, readily occurring to the mind, rest as yet in the domain of either the disputable or the speculative. It is, of course, settled that "a statute may be invalid as applied to one state of facts, and yet valid as applied to another." (*Dahnke-Walker Mill Co.* v. *Bondurant,* U. S. Adv. Ops., 1921-1922, No. 5, p. 114, decided December 12, 1921.)

Unless in this situation of the case this Court can now definitely anticipate and determine that the administration of the statute by West Virginia will be in excess of the legitimate right and power of that State and constitute an abuse of that right and power, and that as a result an injury of serious magnitude will be inflicted on the plaintiffs or their citizens, these suits, as litigation between States, are premature.

In *Kansas* v. *Colorado,* 206 U. S. 46, 117, the bill was dismissed, after hearing on the merits, for the reason, among othe things, that while perceptible injury to portions of the Arkansas Valley in Kansas had been shown, the right of Colorado to divert water from the Arkansas River for irrigation purposes had not yet reached the point at which it could be held that the diversion was in excess of Colorado's rights, and that the injury to Kansas had not attained a scope sufficiently great to sustain a suit between the two States.

In *Missouri* v. *Illinois,* 200 U. S. 496, 521, it was said by Mr. Justice Holmes in rendering an opinion, followed by a dismissal of the bill without prejudice:

> "Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."

In *New York* v. *New Jersey,* U. S. Adv. Ops., 1920-21, p. 544, involving the effect of the Passaic sewerage project on New York, it was said by Mr. Justice Clarke:

> "With the record in this state we come to consider the evidence introduced, but subject to the rule that the burden upon the state of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established

by clear and convincing evidence. *Missouri* v. *Illinois,* 200 U. S. 496."

To the same effect, see:

Kansas v. *Colorado,* 185 U. S. 125.
Missouri v. *Illinois,* 180 U. S. 208.

We do not understand it to be contended seriously that the enforcement of the statute in respect to domestic consumers in West Virginia would materially add to the volume of West Virginia gas consumed, one of the plaintiffs' witnesses admitted as much. (Record 972). If the argument shall be made on behalf of the plaintiff that gas is used for industrial purposes in West Virginia and that the effect of the Act in question will be the greatly increased use thereof for such purposes (the last phase of such argument being in the realm of the speculative) it then may be said, in part, in reply to such argument that—the use of gas for industrial purposes prevails, and has prevailed for years in plaintiff states, large quantities thereof being consumed in each of the said two states for industrial purposes. The record shows (record, vol. 2, pages 1102-1106 and charts there referred to) that great quantities of gas are now being used and have been used for industrial purposes in each of the plaintiff states, and, indeed until comparatively recently, in greater quantity therein than the production thereof in each of them. In view of such a standard existing in each of the plaintiff states how may they consistently, upon such argument, invoke the jurisdiction of this Court at this time in these causes?

In Missouri vs. *Illinois,* 200 U. S. 496, this Court, at page 522 said:

"As to the principle to be laid down, the caution necessary is manifest. It is a question of

the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature. If we are to judge by what the plaintiff itself permits, the discharge of sewage into the Mississippi by cities and towns is to be expected. We believe that the practice of discharging into the river is general along its banks, except where the levees of Louisiana have led to a different course. The argument for the plaintiff asserts it to be proper within certain limits. These are facts to be considered. Even in cases between individuals, some consideration is given to the practical course of events. In the black country of England parties would not be expected to stand upon extreme rights. St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642. See Boston Ferrule Co. v. Hills, 159, Mass. 147, 150, 20 L. R. A. 844, 34 N. E. 85. Where, as here, the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it, that courts should not be curious to apportion the blame."

In *Kansas* v. *Colorado,* 206 U. S. 46, the Court, after taking notice of the local law of Kansas respecting irrigation, as determined by its Supreme Court, at pages 104, 105, said:

> "As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered between herself and a sister state. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation."

As pointed out in the original brief for West Virginia, the presumption being in favor of the validity of the statute and the burden being on the plaintiffs to show a violation of constitutional guaranties, even in a suit between litigants other than States there could be no declaration of unconstitutionality upon mere loose opinion or conjecture. "The fact must be tested by the actual transaction." (*Western U. T. Co.* v. *Speight,* 254 U. S. 17.) The repeated refusal to declare public service rates confiscatory in advance of actual test is illustrative. It has been held frequently that an attack upon a rate prescribed by State statute is premature in the absence of clear and convincing proof that the rate will have the alleged effect.

Smyth v. *Ames,* 169 U. S. 466.
Knoxville v. *Knoxville Water Co.,* 212 U. S. 1, 18, 19.
Willcox v. *Consolidated Gas Co.,* 212 U. S. 19, 54.
Northern Pacific R. Co. v. *North Dakota,* 216 U. S. 579.
Des Moines Gas Co. v. *Des Moines,* 238 U. S. 153, 173.
Missouri v. *Chicago, B. & Q. R. Co.,* 241 U. S. 533, 539, 540.

In *Grand Trunk R. Co.* v. *Michigan R. Com.,* 231 U. S.

457, an order requiring railroad companies to allow joint use of trackage was attacked as an interference with interstate commerce. The case was heard upon conflicting affidavits as to the effect of the enforcement of the order. Mr. Justice McKenna, after pointing out on page 464 that "the contention is premature," proceeds on page 465 as follows:

> "It is too late in the day to question the competency of a state to create a commission and to give it the power of regulating railroads, and necessarily of investigating the conditions upon which regulation may be directed. If a judicial interference is sought with the exercise of such power, it must be clearly shown to have been transcended, not left as a conclusion from the balancing of conflicting affidavits, or even, it may be, as held by the district court, on *ex parte* affidavits. Courts are reluctant to interfere with the laws of a state or with the tribunals constituted to enforce them. Doubts will not be resolved against the law, nor the decision of its tribunals prevented or anticipated unless the necessity for either be demonstrated. Upon these principles the district court acted, and rightly acted."

This being true in ordinary litigation, much the more is it true in a controversy between States.

In this view the suits were premature; for it was not shown by clear and convincing evidence or otherwise that any invasion of rights of serious magnitude was threatened against the plaintiffs or their citizens. In the light most favorable to the plaintiffs, no more was shown than that some gas, otherwise available for transportation to, and consumption in, the plaintiff States,

would be absorbed in West Virginia, by the compulsion of the performance of the duties of its public service gas companies.

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